

BEFORE THE  
TENNESSEE REGULATORY AUTHORITY

RECEIVED

2004 SEP 27 PM 2:35

In re:

Enforcement of Interconnection Agreement  
Between BellSouth Telecommunications, Inc. and  
NuVox Communications, Inc.

T.R.A. DOCKET ROOM

Docket No. 04-00133

---

NUVOX COMMUNICATIONS, INC.'S MOTION FOR LEAVE  
TO FILE REPLY TO BELL SOUTH TELECOMMUNICATIONS, INC.'S  
RESPONSE TO NUVOX'S MOTION TO ADOPT A PROCEDURAL ORDER

---

NuVox Communications, Inc. ("NuVox"), by and through its undersigned counsel, respectfully submits this motion for leave to file a Reply (attached hereto) to the Response filed by BellSouth Telecommunications, Inc. ("BellSouth") on September 8, 2004 to NuVox's Motion to Adopt a Procedural Order filed on August 24, 2004.

BellSouth commenced this action by petition filed pursuant to T.C.A. §65-4-117 and Rule 1220-1-1.09 for interpretation of the audit provisions in Attachment 2, Section 10.5.4 of BellSouth's Interconnection Agreement with NuVox. NuVox filed an answer stating that BellSouth's complaint is frivolous and should be dismissed or denied. NuVox filed a Motion to Adopt Procedural Order in which NuVox requests that the Tennessee Regulatory Authority ("Authority") adopt and incorporate the record in a nearly identical proceeding before the Georgia Public Service Commission; incorporate into the record of this proceeding the Georgia Order, record and pleadings; adopt the same legal conclusions reached by the Georgia Commission; to the extent that the Authority considers adopting legal conclusions that differ from those described in the motion, establish a schedule for oral argument and briefing; and with respect to the Tennessee-specific factual issues, establish a schedule for pre-filed testimony and a limited evidentiary hearing.

In its response to NuVox's motion, BellSouth makes several arguments for why such motion should not be granted. In order to address the assertions in BellSouth's response,

NuVox needs to file a reply. The arguments and precedents cited by BellSouth need to be addressed in order for the Authority to properly consider this matter.

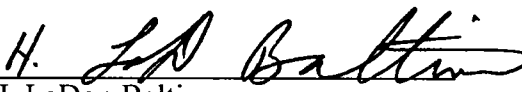
TRA Rule 1220-1-2-.06(3) states: "No reply to response shall be filed except upon leave given upon the order of the authority or hearing officer." Therefore, in compliance with such Rule, NuVox hereby requests leave to file a reply to BellSouth's response. Such reply is attached hereto.

For the reasons stated herein, NuVox requests leave to file the attached Reply to BellSouth's Response to NuVox's Motion to Adopt Procedural Order.

Respectfully submitted,

**NuVox Communications, Inc.**

John J. Heitmann  
Jennifer M. Kashatus  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, NW  
Suite 500  
Washington, D.C. 20036  
(202) 955-9600 (telephone)  
(202) 955-9792 (facsimile)  
[jheitmann@kelleydrye.com](mailto:jheitmann@kelleydrye.com)  
[jkashatus@kelleydrye.com](mailto:jkashatus@kelleydrye.com)

  
H. LaDon Baltimore  
FARRAR & BATES, LLP  
211 Seventh Avenue North  
Suite 420  
Nashville, Tennessee 37219  
(615) 254-3060 (telephone)  
(615) 254-9835 (facsimile)  
[don.baltimore@farrar-bates.com](mailto:don.baltimore@farrar-bates.com)

*Counsel to NuVox Communications, Inc.*

#### **Certificate of Service**

The undersigned hereby certifies that on this the 27<sup>th</sup> day of September, 2004, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

Guy Hicks  
BellSouth Telecommunications, Inc.  
333 Commerce Street, Suite 2101  
Nashville, TN 37201

\_\_\_\_\_  
H. LaDon Baltimore

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	
Between BellSouth Telecommunications, Inc. and	)	Docket No. 04-00133
NuVox Communications, Inc.	)	
	)	

**REPLY TO OPPOSITION OF BELL SOUTH TELECOMMUNICATIONS, INC. TO  
NUVOX'S MOTION TO ADOPT PROCEDURAL ORDER**

NuVox Communications, Inc. ("NuVox"), by its attorneys, respectfully submits its Reply to the Opposition of BellSouth Telecommunications, Inc. ("BellSouth") to NuVox's Motion to Adopt Procedural Order. BellSouth's Opposition is nothing but legally unsupported vitriol and should be ignored for all purposes. Through its Motion to Adopt Procedural Order ("Motion"), NuVox is not, as BellSouth erroneously suggests, attempting to usurp the authority of the Tennessee Regulatory Authority ("TRA" or "Authority") to enforce the parties' interconnection agreement ("Agreement" or "BellSouth/NuVox Agreement"). To the contrary, NuVox has sought to focus the proceeding on the factual issues in dispute that are specific to Tennessee, and not on the uniform legal issues that already have been resolved under applicable Georgia law by the Georgia Public Service Commission ("GPSC" or "Georgia Commission"). To this end, NuVox requests that the Authority: (1) adopt and incorporate the record compiled in the nearly identical proceeding that already has been litigated before the GPSC into this case; (2) adopt the same *legal* conclusions reached by the GPSC; (3) establish a schedule for oral argument and briefing if the Authority considers adopting legal conclusions that differ from

those reached by the GPSC; and (4) establish a schedule for pre-filed testimony and limited evidentiary hearing on the remaining legal/factual issues in dispute.<sup>1</sup>

As discussed below, the Agreement requires that the issues raised in this case must be decided in accordance with Georgia law. There already is Georgia law (the GPSC Order and Order on Reconsideration<sup>2</sup>) squarely addressing most of the legal issues raised, including the core issues of whether BellSouth must demonstrate a concern relevant to particular converted EEL circuits it seeks to audit and whether it must hire an independent auditor free from the influence of BellSouth and capable of conducting an AICPA-compliant audit on its own. Thus, the Agreement, by its own terms requires that the Authority reach a result that is consistent with the decisions already issued by the GPSC. It is preposterous to suggest, as BellSouth does, that identical contract terms from a region-wide agreement can have different meaning in Georgia and Tennessee.<sup>3</sup> The fact that the TRA and the GPSC separately approved identical agreements containing the same relevant provisions simply does not suggest that those provisions were intended to have different meaning in Georgia and Tennessee. Indeed, it is quite clear that the opposite is true: the Agreement was intended to have uniform meaning interpreted under Georgia law (which was selected at BellSouth's insistence) in all nine BellSouth states, except to the extent expressly stated otherwise through the use of the phrase "in Tennessee", etc. (which is not the case with respect to the relevant provisions at issue in this case).

---

<sup>1</sup> See NuVox Motion at 2-5 (describing the factual issues in dispute).

<sup>2</sup> See Letter to Chairman Pat Miller, Tennessee Regulatory Authority, from H LaDon Baltimore (July 21, 2004) (attaching a copy of the order in the Georgia proceeding: *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc and NuVox Communications, Inc*, Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order, Docket No 12778-U (June 30, 2004) ("GPSC Order"), see Letter to Chairman Pat Miller, Tennessee Regulatory Authority, from H LaDon Baltimore (Aug 27, 2004) (providing a copy of the Georgia Commission Order on Reconsideration) ("GPSC Order on Reconsideration")

<sup>3</sup> BellSouth's assertion of this untenable argument demonstrates that it is prepared to raise its rival's costs through litigation, no matter how spurious

Moreover, a failure to give preclusive effect to the GPSC's interpretation of identical contract language may well violate the Full Faith and Credit Clause of the U.S. Constitution.<sup>4</sup> In any event, the Authority's decision in the BellSouth/XO/ITC^DeltaCom proceeding, which has not yet been memorialized in a final order, is not binding precedent applicable to this case.<sup>5</sup> The BellSouth/NuVox Agreement is a different contract between different parties and with different relevant terms than those under review in the BST/XO/ITC^DeltaCom case. Moreover, the BellSouth/NuVox Agreement is a contract governed by Georgia law – not Tennessee law – as apparently was the case with the contracts at issue in the consolidated BST/XO/ITC^DeltaCom case.<sup>6</sup> Most notably, the BellSouth/NuVox interconnection agreement contains a provision incorporating applicable law existing at the time of execution (to the extent not expressly stated otherwise), including the concern and independent auditor requirements from the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* ("SOC")<sup>7</sup> decision. Thus, it is the GPSC's decision involving

---

<sup>4</sup> U S Constitution, Article IV, § 1 See *Global Naps, Inc v Verizon New England Inc*, 2004 WL 1918706 \* 23 (D Mass Aug 26, 2004) (holding that the Massachusetts Department of Telecommunications and Energy violated the Full Faith and Credit Clause by failing to give preclusive effect to a prior interpretation of the Rhode Island Public Utilities Commission of identical language in an interconnection agreement).

<sup>5</sup> See *Report and Recommendation of Pre-Hearing Officer*, Docket No 02-01203 (Feb 13, 2004) ("BST/XO/ITC Pre-Hearing Officer Recommendation") Remarkably, BellSouth not only neglected to admit that the parties and the contract language at issue were different in the BST/XO/ITC^DeltaCom case, but it also neglected to disclose that the issues raised in that case were in significant ways different from those raised in this case. The only common issue decided in the Pre-Hearing Officer's Report and Recommendation was whether BellSouth was required to demonstrate a concern prior to initiating an audit Based on different contract language between different parties, the Hearing Officer decided that a concern was not required Notably, the Hearing Officer in that case did not have before her the language from the General Terms and Conditions of the NuVox Agreement which, under Georgia law, plainly compel a different result

<sup>6</sup> See BST/XO/ITC Pre-Hearing Officer Recommendation at n 31 (citing Tennessee contract law authority, which, pursuant to the BellSouth/NuVox Agreement, does not apply in this case)

<sup>7</sup> See *Georgia Order* at 5-8, see also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (June 2, 2000) ("*Supplemental Order Clarification*")

the same interconnection agreement, the same parties and the same issues that carries binding precedential weight here.

For all the reasons stated, NuVox respectfully requests that the Authority grant its Motion.

**I. THE GEORGIA COMMISSION ALREADY HAS DECIDED MOST OF THE LEGAL ISSUES THAT ARE IN DISPUTE IN THIS PROCEEDING – WITH RESPECT TO THOSE LEGAL ISSUES, THOSE DECISIONS CONSTITUTE BINDING PRECEDENT**

The Agreement at issue in this case is one that the parties voluntarily agreed (at BellSouth's suggestion and insistence) would be governed by Georgia law.<sup>8</sup> The Georgia Commission, at BellSouth's request,<sup>9</sup> already has evaluated the primary issues in dispute, namely, whether BellSouth must demonstrate a concern prior to auditing NuVox's converted circuits and whether BellSouth must select an independent auditor capable of conducting an AICPA compliant audit. After developing a full record, including extensive briefing, oral argument and an evidentiary hearing, the Georgia Commission concluded that the parties incorporated the "concern" and independent auditor (including AICPA compliance) requirements from the *SOC* into their Agreement.<sup>10</sup> Thus, the Georgia Commission's Order and Order on Reconsideration not only represent proper applications of Georgia law, but now in their own right constitute governing (and binding) Georgia law.

---

<sup>8</sup> See Agreement, General Terms and Conditions, § 23 (stating that the Agreement is "governed by, and construed in accordance with, the laws of the state of Georgia")

<sup>9</sup> BellSouth filed its initial complaint at the Georgia Commission – roughly two years prior to filing complaints in Tennessee and elsewhere. BellSouth's General Counsel-GA explained that the reason for doing so was that BellSouth thinks that the GPSC is the best forum to decide the issues stemming from the regional BellSouth/NuVox Agreement, which, as NuVox has noted, is governed by Georgia law. See *Enforcement of Interconnection Agreement Between BellSouth Telecommunications and NuVox Communications*, Hearing Tr. at 48, ll. 2-5 (Aug. 13, 2002) (stating, "Georgia law governs this agreement. BellSouth's view what Commission better to decide what Georgia law requires than the Georgia Public Service Commission.")

<sup>10</sup> See *Georgia Order* at 5-8, 12-14

There is no reason to doubt that the Georgia Commission's holdings on point are correct. As the Georgia Commission found, the Agreement incorporates applicable law existing at the time of contracting, which includes the concern and independent auditor requirements from the *SOC*.<sup>11</sup> Under Georgia law, all law in effect at the time the parties enter into the agreement becomes part of the Agreement, unless specifically excluded.<sup>12</sup> The Georgia Commission correctly found that the parties' did not displace the *SOC*'s "concern" and independent auditor requirements, and, therefore, determined that the parties are bound by those requirements.<sup>13</sup> The Georgia Commission's application of Georgia law in its Order and Order on Reconsideration is now part and parcel of governing Georgia law and, as such, it constitutes binding precedent. Thus, under Georgia law, BellSouth must demonstrate a concern prior to conducting an audit, and must hire an independent auditor to conduct an AICPA compliant audit. To date, BellSouth has done neither in this Tennessee case.<sup>14</sup>

---

<sup>11</sup> *Georgia Order* at 6, 12

<sup>12</sup> *See id* at 5-8

<sup>13</sup> *Id* at 5-8, 12-14

<sup>14</sup> BellSouth's statement regarding its ongoing failure to demonstrate a concern is bizarre and unfounded. *See* BellSouth Opposition at note 4. In its Opposition, BellSouth states, "NuVox is not willing to acknowledge that such a concern has been demonstrated regarding the Tennessee EELs, even though, as NuVox knows, the evidence that supported the GPSC's finding that cause was shown would adequately show cause in this matter were it required." *Id*. NuVox has attempted to resolve the concern issue on numerous occasions, but BellSouth has steadfastly refused to provide NuVox with any documentation that would support BellSouth's claim that it has a concern. Thus, BellSouth continues to insist upon playing a wasteful game of hide-and-seek and NuVox remains unwilling to make any admission with respect to what BellSouth seeks to hide.

With respect to BellSouth's similarly bizarre and unfounded statement regarding the auditor proposed by BellSouth, *see id*, NuVox objects to the auditor proposed for the Tennessee audit just as it did in Georgia (BellSouth served a single notice for all states and proposed the same unqualified auditor for all states). The consulting firm selected by BellSouth to assume the role of auditor, ACA, is subject to BellSouth's influence (as evidenced by the fact that it has conspired with BellSouth before and during other audits on topics related to the audit – a fact revealed at the GPSC hearing) and is not capable of conducting and certifying an AICPA-compliant audit on its own (another fact revealed at the GPSC hearing). NuVox does not believe that BellSouth's choice of auditor is acceptable in any state.

Having accepted the GPSC's decision on these issues, it is disingenuous and inappropriate for BellSouth to now claim in different forums (as it does here and in several other states) that the Georgia Commission's decision is incorrect. In its Opposition, BellSouth conspicuously fails to make any argument (futilely) attempting to explain how the GPSC got it wrong, but instead, simply claims that "NuVox makes much of BellSouth's decision not to ask the GPSC to reconsider its conclusions."<sup>15</sup> Indeed, NuVox does. It is very significant that BellSouth *did not* seek reconsideration or review of the Georgia decision on these issues (and was denied with respect to the two issues it did seek reconsideration on ). The Agreement is the same throughout the nine-state region, and BellSouth is bound by the determination reached by the Georgia Commission which is now part and parcel of governing Georgia law and which cannot be overturned.<sup>16</sup> BellSouth cannot now properly ask the TRA to undo Georgia law and to force the anomalous and erroneous result of a contract with identical provisions having contrary meanings in different states (despite the fact that it is governed in both states by the law of one state).

Although BellSouth makes no mention of it, the TRA must be aware that failure to give preclusive effect to the GPSC's interpretation of identical contract language may well violate the Full Faith and Credit Clause of the U.S. Constitution.<sup>17</sup> *See Global Naps, Inc v Verizon New England Inc* , 2004 WL 1918706 \* 23 (D. Mass. Aug. 26, 2004) (holding that the Massachusetts Department of Telecommunications and Energy violated the Full Faith and Credit Clause by failing to give preclusive effect to a prior interpretation of the Rhode Island Public

---

<sup>15</sup> Opposition at 11

<sup>16</sup> Had BellSouth appealed the GPSC Order, it may have had the option of withdrawing this complaint case and waiting-out an appeal in hope of a change in Georgia law. Decisions of the Georgia Commission are and remain Georgia law unless and until overturned. The mere filing of an appeal does not stay their effectiveness

<sup>17</sup> U S Constitution, Article IV, § 1



Utilities Commission of identical language in an interconnection agreement). The Full Faith and Credit Clause, in simplistic terms, requires one state to honor and apply the judicial determinations made in another state<sup>18</sup> and requires that the common law doctrines of preclusion be applied in one state to the same extent that they are applied in the state of rendition.<sup>19</sup>

In *Global NAPS, Inc v Verizon New England*,<sup>20</sup> the United States District Court concluded that the Massachusetts Department of Telecommunications and Energy was required to give preclusive effect to the legal issues previously addressed by the Rhode Island Public Utilities Commission. In that case, the Rhode Island Public Utilities Commission was evaluating whether, under the interconnection agreement between Verizon and Global NAPs, Global NAPs was entitled to reciprocal compensation for ISP-bound traffic. The Rhode Island Public Utilities Commission evaluated whether an FCC order was a final order for purposes of the reciprocal compensation provisions in that agreement. The court concluded that the Massachusetts DTE was required to give preclusive effect to that legal determination.

Although the decision by the federal district court in *Global NAPS v Verizon* appears to be the first to apply the Full Faith and Credit Clause in such a manner, there appears to be no body of law that holds the contrary. Notably, when BellSouth asserts that the TRA need not give precedential effect to the GPSC's decisions regarding the same disputes and identical contract terms under governing Georgia law, it provides no legal support for its position (despite its bald assertion – preceded by two-plus pages off off-point filler – that undisclosed “authorities

---

<sup>18</sup> See *First Bank of Holly Springs v Wyssbrod*, 124 S W 3d 566 (Tenn Ct App 2003), See Also U S Const Art IV, Section 1 (“Full Faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state”).

<sup>19</sup> See *First Bank of Holly Springs v Wyssbrod*, 124 S W.3d 566 (Tenn Ct App 2003) (citing *Benham v Fisher*, 650 S W 2d 759 (Tenn Ct. App 1983)) See also Article IV, § 1 of the United State Constitution which provides, in pertinent part, that “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”

<sup>20</sup> \_\_\_\_ F Supp 2d \_\_\_\_ (Aug 6, 2004), 2004 WL 1918706

make clear” that the TRA is free to ignore entirely the GPSC’s decision on the same contract claims).<sup>21</sup> “Obviously”, BellSouth’s novel claim that the same contract provisions governed by the same body of law can have different meanings in different jurisdictions offends common sense and is legally unsupportable. Less obvious, however, is whether adopting the arguments presented by BellSouth would upend principles so fundamental that they come within the ambit of the Full Faith and Credit Clause of the United States Constitution. Given BellSouth’s failure to explain how the GPSC mis-applied Georgia law and to have the GPSC Orders set aside, the Authority should prudently steer clear of this controversy by adopting the well-supported and correctly applied legal conclusions adopted by the Georgia Commission. BellSouth provides the Authority with no compelling (or lawful) reason to do otherwise. The Authority then can address the Tennessee-specific legal/factual issues in dispute: whether BellSouth has demonstrated a concern for the particular circuits at issue in Tennessee, whether BellSouth’s chosen auditor to conduct the Tennessee audit is independent, and whether, BellSouth, at any point, would be entitled to interest.

Finally, it is important to note that NuVox is in no way usurping the Authority’s jurisdiction by requesting that the Authority incorporate the Georgia Commission decisions into this proceeding and by asserting that those decisions are binding precedent. The complaint filed by BellSouth is squarely before the TRA and NuVox does not challenge the TRA’s jurisdiction over it. Unless the parties arrive at a negotiated settlement or BellSouth unilaterally drops its demand for an audit to which it is not entitled, BellSouth certainly will need a TRA order to obtain the relief it wrongly claims it is entitled to in Tennessee. By the terms of the Agreement, however, the TRA is bound to interpret the Agreement consistent with Georgia law and it must

---

<sup>21</sup> BellSouth Opposition at 11 (filler at 9-11)

apply that law to Tennessee facts. The TRA must in this case dismiss BellSouth's self-serving invitation to engage in decision-making that ignores the terms of the contract at issue and the law that governs. In so doing, the TRA must reject BellSouth's reckless request to adopt an untenable decision wherein Georgia law and identical contract provisions mean something different in Tennessee than in Georgia.

## **II. NEITHER THE PRE-HEARING OFFICER'S RECOMMENDATION IN THE BELL SOUTH/XO/ITC^DELTA COM EELS AUDIT CASE NOR THE AUTHORITY'S ADOPTION OF IT IS BINDING LEGAL PRECEDENT APPLICABLE TO THIS CASE**

BellSouth's reliance on the Authority's decision in the BellSouth/XO/ITC^DeltaCom proceeding is thoroughly misplaced. As an initial matter, the Authority has not yet issued a final order in that proceeding.<sup>22</sup> Therefore, there is no order in place to serve as binding precedent.

Even if there were a final decision memorializing the TRA's adoption of the Pre-Hearing Officer's disposition of certain issues raised in the BellSouth/XO/ITC^DeltaCom case on competing motions for summary judgment, such an order would not be binding precedent applicable to this case.<sup>23</sup> Critically, the agreements at issue in that proceeding (and the contracting parties thereto) are distinct from the Agreement at issue (and the parties thereto) in this case. A review of the provisions cited in the Pre-Hearing Officer's Recommendation in that case and the Complaint and Answer filed in this case indicates that there are substantial differences in the relevant provisions of the three contracts. Most notably, the parties'

---

<sup>22</sup> See *Report and Recommendation of Pre-Hearing Officer*, Docket No. 02-01203 (Feb. 13, 2004) ("BST/XO/ITC Pre-Hearing Officer Recommendation"). No order has been issued adopting the Pre-Hearing Officer Recommendation.

<sup>23</sup> See *id.*

Agreement in this case incorporates, consistent with Georgia law, existing applicable law (except to the extent expressly excluded), which includes the *SOC*'s concern and independent auditor requirements, into the Agreement.<sup>24</sup> Furthermore, testimony produced during the Georgia proceeding demonstrates that the parties had no intention to displace the FCC's concern and independent auditor requirements with the negotiated EEL audit provision that is silent with respect to those requirements and which adopts no conflicting requirements.

Remarkably, in its Opposition, BellSouth not only neglected to admit that the parties and the contract language at issue were different in the BST/XO/ITC^DeltaCom case, it also neglected to disclose that the issues raised in that case were in significant ways different from those raised in this case. The only common issue decided in the Pre-Hearing Officer's Report and Recommendation was whether BellSouth was required to demonstrate a concern prior to initiating an audit. Based on different contract language between different parties, the Hearing Officer decided that a concern was not required. Notably, the Hearing Officer in that case did not have before her the language from the General Terms and Conditions of the BellSouth/NuVox Agreement which, under Georgia law, plainly compel a different result.

Indeed, the General Terms and Conditions of BellSouth/NuVox Agreement contain a provision incorporating applicable law existing at the time of execution (to the extent not expressly stated otherwise), including the concern and independent auditor requirements from the FCC's *SOC* decision.<sup>25</sup> Moreover, as apparently was not the case in the

---

<sup>24</sup> Agreement, General Terms and Conditions, § 35

<sup>25</sup> Notably, in the BellSouth/XO/ITC^DeltaCom Recommendation, the Pre-Hearing Officer determined that a similar provision was not present in the BellSouth/XO and BellSouth/ITC^DeltaCom agreements. See Pre-Hearing Officer Recommendation at 9 (explaining that neither agreement contained a provision that revealed an intent to defer to federal law for requirements not addressed in the audit provision)

BellSouth/XO/ITC^DeltaCom cases,<sup>26</sup> the General Terms and Conditions of BellSouth/NuVox interconnection agreement contain a provision specifying Georgia law as the governing law. Pursuant to these provisions, the Georgia Commission correctly found that BellSouth must demonstrate a concern with respect to each converted circuit it seeks to audit and it must hire an independent auditor that is free from BellSouth's influence to conduct an AICPA-compliant audit.

In light of these provisions of the BellSouth/NuVox Agreement, it is the GPSC's decision involving the same interconnection agreement and the same parties that constitutes governing Georgia law and carries binding precedential weight here.

### **III. IT IS INAPPROPRIATE TO RESOLVE THIS CASE THROUGH CROSS SUMMARY JUDGMENT MOTIONS**

NuVox opposes BellSouth's suggestion that this proceeding could be resolved through cross summary judgment motions. Summary judgment is appropriate where: (1) there is no genuine issue with regard to material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.<sup>27</sup> In evaluating a motion for summary judgment, all facts and circumstances must be viewed in a light most favorable to the non-moving party.

In the present case, summary judgment is inappropriate because there are material issues of fact in dispute. In particular, the parties dispute whether BellSouth has demonstrated a

---

<sup>26</sup> We say "apparently" because the Pre-Hearing Officer cites to a Tennessee case for governing contract law authority. See Pre-Hearing Officer Recommendation at note 31. NuVox did not check for a governing law provision in either the BellSouth/XO or BellSouth/ITC^DeltaCom agreements, as the contents of any such provision would not change the fact that the Pre-Hearing Officer apparently applied Tennessee law and not Georgia law in the BellSouth/XO/ITC^DeltaCom case, which is in itself yet another reason why that decision cannot serve as binding precedent in this case.

<sup>27</sup> See *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004), see also *Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83 (Tenn. 2000).

concern such that it is permitted to conduct an audit of particular converted EEL circuits and whether the auditor selected by BellSouth is an AICPA-compliant independent auditor (such that it is free from the influence of BellSouth). Thus, although most of the legal issues can and should be decided quickly (in accordance with the GPSC decisions), there will remain at least one other legal issue (whether BellSouth would in any event be entitled to interest) and several issues where the law must be applied to Tennessee facts. NuVox, however, would welcome the efficient resolution of this case and that is the very reason why NuVox's Motion to Adopt a Procedural Order should be granted.

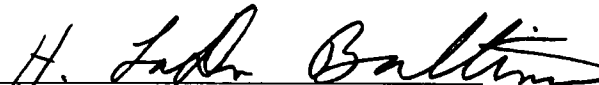
#### **IV. CONCLUSION**

For the foregoing reasons, NuVox respectfully requests that the TRA grant its Motion to Adopt a Procedural Order.

Respectfully submitted,

**NuVox Communications, Inc.**

John J. Heitmann  
Jennifer M. Kashatus  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, NW  
Suite 500  
Washington, D.C. 20036  
(202) 955-9600 (telephone)  
(202) 955-9792 (facsimile)  
[jheitmann@kelleydrye.com](mailto:jheitmann@kelleydrye.com)  
[jkashatus@kelleydrye.com](mailto:jkashatus@kelleydrye.com)

  
H. LaDon Baltimore  
FARRAR & BATES, LLP  
211 Seventh Avenue North  
Suite 420  
Nashville, Tennessee 37219  
(615) 254-3060 (telephone)  
(615) 254-9835 (facsimile)  
[don.baltimore@farrar-bates.com](mailto:don.baltimore@farrar-bates.com)

*Counsel to NuVox Communications, Inc*

September 27, 2004